Supreme Court, U.S.
FILED
NOV 7 - 2003
OFFICE OF THE CLERK

No. 03-311

IN THE

# Supreme Court of the United States

OCTOBER TERM, 2003

PAUL S. MINOR,

*Petitioner*,

v.

K-MART CORPORATION,

*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## REPLY BRIEF FOR PETITIONER

E. BARRETT PRETTYMAN, JR.
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004-1109
(202) 637-5685
Of Counsel

LUTHER T. MUNFORD*
MICHAEL B. WALLACE
PHELPS DUNBAR L.L.P.
P. O. Box 23066
Jackson, MS 39225-3066
(601) 352-2300

* Counsel of Record

*Counsel for Petitioner*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

10 pp

## TABLE OF AUTHORITIES


Page

*CASES:*

*Benton* v. *G&O Mfg. Co.*, 921 F. Supp. 905 (D. Conn. 1995) ..... 6

*Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) ..... 3, 7

*G-I Holdings, Inc. v. Baron & Budd*, 2002 WL 1934004 (S.D.N.Y. 2002) ..... 6

*Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.* v. *Multistate Legal Studies*, 26 F.3d 948 (9th Cir. 1994) ..... 6

*In re 680 Fifth Ave. Assocs.*, 218 B.R. 305 (S.D.N.Y. 1998) ..... 6

*Moses v. K-Mart Corp.*, 922 F. Supp. 600 (S.D. Fla. 1996), *aff'd in relevant part*, 136 F.3d 140 (11th Cir. 1998) ..... 2

*Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71 (2d Cir. 2000) ..... 6

*Simon DeBartolo Group, L.P.* v. *Richard E. Jacobs Group, Inc.*, 985 F. Supp. 427 (S.D.N.Y. 1997), *aff'd in relevant part*, 186 F.3d 157 (2d Cir. 1999) ..... 6

*Sussman v. Bank of Israel*, 56 F.3d 450 (2d Cir.), *cert. denied*, 516 U.S. 916 (1995) ..... 6

*Van Huss v. Landsburg*, 262 F. Supp. 867 (W.D. Mo. 1967) ..... 2

*RULES*:

Fed. R. Civ. P. 11 ..... 1, 3, 5-7
Fed. R. Civ. P. 11(b) ..... 4-5
Fed. R. Civ. P. 11(b)(1) ..... 4
Fed. R. Civ. P. 11(b)(2) ..... 2, 4

*CONSTITUTION*:

U.S. CONST. amend. I ..... 2-4

*OTHER AUTHORITIES*:

11 Charles A. Wright, Arthur R. Miller and M. Kane, *Federal Practice and Procedure* § 2907 (2d ed. 1995) ..... 2

*Amendments to Federal Rules of Civil Procedure*, 146 F.R.D. 501 (1993) ..... 4-6

Carol R. Andrews, *Jones v. Clinton: A Study in Politically Motivated Suits, Rule 11, and the First Amendment*, 2001 B.Y.U. L.Rev. 1 (2001) ... 6

Jerold S. Solovy, *Sanctions Under Rule 11*, 691 PLI/LIT 235 (2003) ..... 5

*The Chicago Manual of Style* ¶¶ 6.60 (15th rev. ed. 2003) ..... 5

IN THE

# Supreme Court of the United States

OCTOBER TERM, 2003

No. 03-311

PAUL S. MINOR,

*Petitioner*,

v.

K-MART CORPORATION,

*Respondent*.

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

---

## REPLY BRIEF FOR PETITIONER

---

Kmart's Brief in Opposition to Petition for Writ of Certiorari lays plain the stakes in this case. The Court should grant a writ of certiorari to (i) avoid chilling litigants' and counsel's advocacy with the threat of Federal Rule of Civil Procedure 11 sanctions for extra–judicial actions that may embarrass the opposing party and publicize their own success in court; and (ii) resolve a recognized Circuit split over whether an allegedly improper purpose merits Rule 11 sanctions against a lawyer who files a paper that is otherwise appropriate and warranted.

The Fifth Circuit's ruling, if not overturned, could have far–reaching consequences. Litigants may forfeit or abandon

substantive rights in fear that their opponent or the court will reach behind a legitimate paper and seek or impose sanctions for perceived ill motives. Counsel and litigants will hedge their advocacy to avoid the specter of sanctions, thereby chilling bedrock First Amendment freedoms.[1] And courts almost certainly will become mired in resolving disputes between parties whose filings are appropriate but whose respective counsel impugn each other's motives.

Kmart's Statement of the Case[2] makes a critical concession. It recognizes that the Fifth Circuit's *en banc* ruling "assumed [Minor's] compliance with Rule 11(b)(2)."[3] As such, Kmart's arguments about state law and the facts surrounding it, including Minor's purported failure to investigate the legal basis for a writ of execution, are entirely irrelevant.[4]

The relevant facts, as stated in the Petition, are that Minor acted, in part, with an intent to embarrass Kmart and to publicize his significant victory, and that the pleadings filed by Minor were, at all times, warranted by existing law or a non–frivolous extension of the law.

Kmart states that Minor "posits as a 'question presented' that the First Amendment is violated by the sanction imposed

---

[1] U.S. CONST. amend. I.

[2] Br. in Opp'n at 3-8.

[3] *Id.* at 8. Rule 11(b)(2) requires in part that attorneys certify that papers filed "are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law . . . ." Fed. R. Civ. P. 11(b)(2).

[4] Although not relevant here, it is interesting to note that Minor had law to support him --a district court case and Wright, Miller and Kane's *Federal Practice and Procedure* treatise -- and that no case, treatise, law review article, or any material in Westlaw's text and periodicals database states that a party can obtain a state law stay in federal court without asking for it. *See* Pet. at 4-7; *Van Huss v. Landsburg*, 262 F. Supp. 867 (W.D. Mo. 1967); 11 Charles A. Wright, Arthur R. Miller and Mary K. Kane, *Federal Practice and Procedure* § 2907 (2d ed. 1995); *see also Moses v. K-Mart Corp.*, 922 F. Supp. 600 (S.D. Fla. 1996), *aff'd in relevant part*, 136 F.3d 140 (11th Cir. 1998).

in this case."[5] Minor does no such thing. Not only does the Question Presented not posit such an issue, but Minor made it abundantly clear in his petition that that is not the issue before the Court.[6] Rather, Minor raises a very different issue: whether in light of First Amendment considerations, Rule 11 should be interpreted in a way that results in sanctions against a lawyer for speaking to the press.

Kmart makes the extraordinary argument that Minor was sanctioned not for what he said to the press, but rather for his misuse of a judicial proceeding.[7] There are, of course, three answers to this.

1. Both of the controlling decisions below – those of the district court and of the Circuit *en banc* – made quite clear that it was what Minor *said* to the press that resulted in sanctions.[8]

2. Kmart cannot hew the content of Minor's speech from the speech itself. Because even Kmart concedes that Minor was sanctioned for seeking to embarrass Kmart and call attention to himself,[9] it is difficult to understand how he could be sanctioned on these bases without reliance on what he said to the press. Kmart even quotes the very statements that Kmart – and the courts – rely on for proving that Minor was attempting to embarrass the company.[10] This Court has refused to make the false distinction Kmart urges between the content of the act and the act itself.[11] By analogy,

---

[5] Br. in Opp'n at 9.

[6] Pet. at 13 n.5.

[7] Br. in Opp'n at 9-11.

[8] *See, e.g.*, App. 56a, 57a, 66a (district court); 3a, 15a, 16a, 18a (Circuit *en banc*).

[9] Br. in Opp'n at 4-6, 9-11.

[10] Br. in Opp'n at 4.

[11] In *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034, 1044-47 (1991), for instance, the Court held that Gentile's press conference was "classic political speech" protected by the First Amendment. The Court did not strip the speech of protection by labeling it mere evidence of the sanctioned conduct.

Kmart's failure to secure commercial space against the abduction and rape of patrons was not mere evidence of a breach of duty, but the breach itself.

3. The Fifth Circuit's *en banc* holding directly contradicts Kmart's assertion that Minor was sanctioned for "misuse of the judicial process."[12] The majority assumed for purposes of its opinion that Minor did *not* violate Rule 11(b)(2) – in other words, that he did *not* misuse the judicial process, but instead tried to embarrass Kmart and call attention to himself, which, "independent from" Rule 11(b)(2), proved an "improper purpose" under Rule 11(b)(1).[13]

Thus, the issue is precisely the one presented to the Court in the petition: in light of First Amendment principles, can an attorney be sanctioned for an "improper purpose" on the basis of statements to the press intended to embarrass his opponent in a lawsuit and call attention to himself?

**1993 Rule 11 Amendment.**

Kmart would have the Court believe that the 1993 Rule 11(b) amendments worked a dramatic change. Not so.

The 1993 amendments made purely stylistic changes, while preserving the 1983 Rule's operative language and legal standard.[14] Specifically, the 1993 Rule reaffirms the 1983 Rule's "improper purpose" standard. It leaves the

---

[12] Br. in Opp'n at 9-10.

[13] App. 10a, 12a. Kmart seems to contend that the Court should not grant certiorari because the district court held in the alternative that Minor violated Rule 11(b)(2) by seeking a writ of execution without a proper basis. Aside from the fact that the Fifth Circuit *en banc* assumed otherwise and that the district court almost certainly was wrong, the district court's alternative holding has no effect on this Court's analysis of the issues before it and should not stop the Court from granting certiorari to resolve the recognized Circuit split.

[14] *Amendments to Federal Rules of Civil Procedure*, 146 F.R.D. 401, 420-21 (1993) (emphasis added).

"improper purpose" test unchanged and repeats the conjunction "and" joining it to the merits part of the test.

The Advisory Committee confirmed the lack of substantive change. The Committee drafted the 1993 amendments simply to "*restate*" the 1983 legal standard.[15] In contrast to the Committee's lengthy discussion of other revisions to Rule 11, the brief treatment of Rule 11(b) makes clear that the reorganization was not a substantive change, but a technical makeover.[16]

The most compelling demonstration of this *status quo*, however, is that the 1993 amendments did not alter the prior Rule 11(b) views of either commentators or courts.

The most comprehensive analysis of Rule 11 case law this year concluded that "[t]his split [before and after 1993] has continued unresolved."[17] Another Rule 11 commentator recognized in 2001 that courts "have conflicting opinions as to whether publicity and political motives are proper aims."[18]

---

[15] *Amendments*, 146 F.R.D. at 584.

[16] Kmart's argument to the contrary rests exclusively on the reorganization and re-punctuation of the substantively-unchanged enumerated factors. In the 1983 version, Kmart asserts, the factors were "barely separated by commas," while in the 1993 version, the same factors are separated by spaces and semicolons. Br. in Opp'n at 15. Usage guides long have recognized that a semicolon may properly separate items in a list when those items already contain commas. *See, e.g., The Chicago Manual of Style* ¶¶ 6.60, 6.126 (15th rev. ed. 2003). Both the 1983 Rule and the 1993 Rule enumerate lists of factors that already contain commas. The reason for the 1993 amendment, then, is as stated by the Committee: to correct the punctuation of the list.

[17] Jerold S. Solovy, *Sanctions Under Rule 11*, 691 PLI/Lit 235 (2003) (stating that, "[i]n fact, the 1993 amendment did not change the 'improper purpose' provisions at all."). The 1993 Rules Change Advisory Committee recognizes Mr. Solovy as one of only two authorities "[f]or book-length analyses of the case law" on Rule 11. *See Amendments*, 146 F.R.D. at 583-84.

[18] Carol R. Andrews, *Jones v. Clinton: A Study in Politically Motivated Suits, Rule 11, and the First Amendment*, 2001 B.Y.U. L. Rev. 1, 95 (2001).

Moreover, the cases on which Minor relies remain very much alive. *Sussman v. Bank of Israel*,[19] for instance, continues to be cited and followed by the Second Circuit and district courts.[20]

Kmart cites no cases to support its position that the 1993 amendments resolved the Circuit conflict.

**Pre–judgment versus post–judgment effect of Rule 11.**

Kmart's argument, made without supporting authority, that post–judgment papers are entitled to less protection than pleadings has no merit here. Rule 11 applies to any "pleading . . . or other paper." It does not distinguish a complaint from a motion or an application for a writ of execution.[21]

Policy concerns underlying Rule 11 would in fact support a less rigorous evaluation of post–judgment pleadings, rather than a more rigorous one. In *Gentile*, 501 U.S. at 1070-74, this Court identified two primary reasons for sanctioning the public statements of a lawyer: to protect the integrity of the judicial process and to ensure a fair trial. As the *Gentile*

---

[19] 56 F.3d 450 (2d Cir.), *cert denied*, 516 U.S. 916 (1995).

[20] *See Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 78-80 (2d Cir. 2000); *G-I Holdings, Inc. v. Baron & Budd*, 2002 WL 1934004, *16 (S.D.N.Y. Aug. 21, 2002); *In re 680 Fifth Ave. Assocs.*, 218 B.R. 305 (S.D.N.Y. 1998) (holding that in the Second Circuit Rule 11 requires a showing of both improper purpose and "clear evidence that the challenged actions were entirely without color and taken for improper purposes"); *Simon DeBartolo Group, L.P.* v. *Richard E. Jacobs Group, Inc.*, 985 F. Supp. 427, 433 (S.D.N.Y. 1997) ("Subjective evidence of the party's or attorney's purpose must be 'disregarded.'"), *aff'd in relevant part*, 186 F.3d 157 (2d Cir. 1999); *Benton* v. *G&O Mfg. Co.*, 921 F. Supp. 905, 908 (D. Conn. 1995) ("In determining whether Attorney Hart's post-removal filings violated this subdivision of the Rule, an objective standard must be applied.").

[21] *See, e.g. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.* v. *Multistate Legal Studies*, 26 F.3d 948, 953 (9th Cir. 1994) (refusing to award Rule 11 sanctions for filing of meritorious retaliatory motion for contempt under prior judgment).

Court noted, these governmental interests in restraining attorney speech end when final judgment is entered. Accordingly, sanctions for conduct after judgment are not well–suited to furthering these twin aims of Rule 11.

For many of the reasons stated above, five judges sitting in this case – King (Chief Judge), Smith, Benavides, Politz (since deceased), and Fallon (sitting by designation) – thought that sanctions were not warranted and that the Fifth Circuit's *en banc* opinion raised serious and fundamental concerns about a lawyer's ability to advocate for his clients. We submit that they were right.

Respectfully submitted,

E. BARRETT PRETTYMAN, JR.
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004-1109
Telephone: (202) 637-5685
Of Counsel

LUTHER T. MUNFORD*
MICHAEL B. WALLACE
PHELPS DUNBAR L.L.P.
P. O. Box 23066
Jackson, MS 39225-3066
Telephone: (601) 352-2399

*Counsel of Record

Counsel for Petitioner